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No. 79-1356

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

KATHY SUE JOHNSON, et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

REPLY MEMORANDUM IN SUPPORT OF SUGGESTION OF MOOTNESS

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Petitioners' response to the Board of Education's Suggestion of Mootness fails to rebut the Board's showing that this dispute has ceased to exist.

Petitioners first assert that the Board's abolition of the quota plans effective at the end of this school year does not moot the case because it might be fully briefed, argued, decided and "subject to injunctive relief" within the next seven months. However, this case involves pupil assignments, with all their accompanying administrative and logistic

difficulties. In such cases, reassignments are routinely commenced not in the middle of a semester, but at the beginning of the coming semester. Thus, even if petitioners' ambitious timetable were met and a decision favorable to petitioners were rendered early in calendar year 1981, relief would not be effective until the next semester -- the Fall of 1981. In the interim, the quota plans will have terminated pursuant to the Board's recent decision.

Petitioners next contend that the abolition of the quota plans does not affect an individual student's asserted right to be reassigned to one of the two schools in question because, "under the terms of the quota plan, excluded children relegated to alternative schools 'are to be considered members of that [alternative] school's regular student body and, therefore, are not unilaterally transferable.'" (Opposition, p. 3; emphasis added) In fact, the "terms of the quota plan", including those concerning reassignments, cease to be effective when the quota plan itself terminates. More importantly, even if the plans at issue had not been abolished, a victory for petitioners would not mean "that they can be readmitted to their neighborhood schools." (Opposition, p. 3) All student assignments next Fall will be determined by the system-wide desegregation plan, and petitioners -- like all other students at every public school in Chicago -- will be assigned so as to "provide for the establishment of the greater practicable number of stably desegregated schools." (Consent Decree Par.I.2.1, reprinted at Suggestion of Mootness, App. 5)

Petitioners also argue that, notwithstanding the mootness of their prayer for injunctive relief, they have "a continuing claim for money damages" based on the Complaint's boilerplate request for "such other and further relief . . . as the Court may deem just and proper." (Opposition, p. 3) This argument, however, is squarely at odds with petitioners' conduct throughout this litigation. Not once during the District Court proceedings did petitioners reveal their supposed "intent" to include a damage claim, not a single exhibit concerned monetary damages and no testimony was adduced on this issue. Similarly, not once in their several Court of Appeals submissions did petitioners argue a damage claim. So too, petitioners' Brief in this Court is silent on the question of damages. With all respect due petitioners, we submit that their damage theory is an afterthought bearing no relation to the actual record developed during the course of this litigation. We also note that neither petitioners nor the Government identifies a single student assignment case involving a damage award. Thus, even if there is some merit to the Government's position that damages could be awarded in an appropriate case, resolution of this novel issue is singularly inappropriate in the present context, where petitioners neither sought nor adduced evidence that could support such an award and where neither the District Court nor the Court of Appeals had the opportunity to address the issue.*/

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*/ In contrast to their silence on the question of damages, petitioners vigorously argued in the District Court and

(Footnote continued on following page)

Finally, petitioners' case is not saved by their contention that the provisions of the consent decree "provide no assurance that petitioners will not again be the victims of unlawful discrimination." By expressly providing that the Board's desegregation plan must be "constitutionally acceptable," the consent decree assures that neither these petitioners nor any students in the Chicago public school system will be "victims of unlawful discrimination" in pupil assignment. Similarly, the Government's concern with its inability to "predict the impact of the comprehensive plan" on students from the Gage Park and Morgan Park attendance areas underscores rather than rebuts the Board's position that this case is no longer ripe for adjudication. The Government's speculation that the Board might adopt, over the Government's objection, a

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(Footnote continued from preceding page)

Court of Appeals for an award of attorneys fees. However, they did not include the denial of fees as an issue on certiorari, and in all events such a claim cannot revive an otherwise moot case. To hold otherwise would lay to rest the doctrine of mootness, for all disappointed litigants retain the hope, however slim, that ultimate vindication will result in an award of attorneys fees and costs. See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States 501 n.1 (1951 ed.) (collecting cases holding that controversies as to costs do not revive moot cases). Deposit Guarantee National Bank v. Roper, 48 U.S.L.W. 4279 (March 3, 1980), is not to the contrary. There, the issue was whether denial of class certification survived an offer of judgment to the putative class representatives. The decision in Roper, which is part of the peculiar jurisprudence of class actions, involved but did not turn on the possibility that named plaintiffs can collect for attorneys fees and costs from other class members. The case in no way suggests that a request for attorneys fees from the opposing party will keep alive an otherwise moot case.

system-wide plan incorporating some unidentified features of the quota plan is no reason to litigate this issue in the context of a plan that no longer exists. Rather, this issue, if it arises at all, should be litigated in the first instance in the District Court supervising the system-wide plan.*/

In sum, petitioners' dispute with the Board has ceased to be a live case or controversy. A decision on the merits by this Court would affect no one's concrete rights, while briefing and argument on the merits could well hinder the Board's fulfillment of its obligation under the consent decree to develop a system-wide desegregation plan. In these circumstances, the writ of certiorari should be dismissed and the Board should be allowed to develop and implement a system-wide desegregation plan without engaging in academic yet acrimonious litigation.

Respectfully submitted,

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*/ The Government's concern with the possible stare decisis effect the decisions below can be obviated by accepting the Government's suggestion that, when dismissing the writ of certiorari, this Court vacate the judgment of the Court of Appeals.

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v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

1. I am counsel for the respondents in the above-captioned case.

2. Three copies of the respondents' Reply Memcrandum Suggestion of Mootness were hand-delevered this 15th day of October, 1980 to: Thomas H. Morsch, attorney for petitioners; Sybille Fritzsche, co-counsel for petitioners; Wade H. McCree, Solicitor General; and, Drew S. Days, Assistant Attorney General.

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